

So What *Does* the Jury Decide About Prior Strikes?

JUDGE J. RICHARD COUZENS
SUPERIOR COURT OF
PLACER COUNTY

Since the enactment of the three-strikes law, trial and appellate courts have struggled to define the bifurcated fact-finding duties of judges and juries in the determination of prior strikes. Courts have been divided on the issue. All of the decisions of the state's Courts of Appeal have been granted review by the California Supreme Court. Thus far, the Supreme Court has published two cases containing some guidance for the trial courts: *People v. Kelii* (1999) 21 Cal.4th 452 and *People v. Epps* (2001) 25 Cal.4th 19.

Kelii and *Epps* indicate that the fact-finding role of the jury is very narrow. *Kelii* observed that determining the exact offense or whether the defendant was sentenced to prison is the job of the court. Both cases confirm the obligation of the jury, under Penal Code section 1025(b), to determine whether the defendant "suffered" the prior conviction. The two cases agree that in limited situations juries may be called upon to determine the authenticity, accuracy, or sufficiency of the records of the prior

conviction when such issues legitimately are in dispute. *Epps* suggests that the defendant must present some evidence in rebuttal of the presumption created by Evidence Code section 664 ["that official duty has been regularly performed"] before the court is obligated to present issues of authenticity, accuracy, or sufficiency of the records of conviction to the jury.

In the vast majority of cases, there is no real factual dispute for the jury to resolve. With the role of the jury being substantially proscribed, what is the trial court to tell the jury? "In a typical case, the prosecutor and the court can explain to the jury that, though the evidence is uncontroverted, the law nevertheless entitles the defendant to a jury verdict. The jury would then better understand its role. The court, however, should be careful not to direct a verdict, which would be inconsistent with the defendant's right to a jury trial." (*Epps*, *supra*, 25 Cal.4th at p. 28.)

Epps expressly declined to reconsider that portion of *Kelii* which held that the court determines whether the prior conviction constitutes a strike. Reconsideration had been requested in light of the U.S. Supreme Court decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348. *Apprendi* held that, other than the simple fact of a prior conviction, any factual circumstance that increases the penalty for a crime above the normal statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. *Epps* concerned

the proof of a prior kidnapping, a crime that would constitute a strike regardless of the underlying circumstances. The court declined to speculate how *Apprendi* should be applied in a situation such as *Kelii*, where the proof of some factual circumstance (e.g., whether a burglary was of a residence) was necessary to establish the prior conviction as a strike.

Absent further appellate guidance, therefore, the division of labor between the court and jury under section 1025 appears to be as follows.

ISSUES DECIDED BY THE COURT

- The constitutionality of the prior conviction, if collateral attack is appropriate. (See *Garcia v. Superior Court* (1997) 14 Cal.4th 953 and *People v. Allen* (1999) 21 Cal.4th 424.)
- Whether the prior conviction qualifies as a strike. While *Kelii* intimated that a court may engage in limited fact finding in making such a determination, the opinion should not be construed to approve fact finding that extends to the broad underlying factual circumstances of the prior conviction.
- The identity of the defendant as the person who suffered the prior conviction. (Pen. Code, § 1025(c).)
- Whether two or more prior convictions were "separately brought and tried" within the meaning of Penal Code section 667(a). (See *People v. Wylie* (1995) 9 Cal.4th 580.)

ISSUES DECIDED BY THE JURY

- Whether the defendant "suffered" the prior conviction.

(Pen. Code, § 1025(b).)

□ The factual nature of the prior conviction when such a finding is necessary to determine whether the prior conviction is a serious or violent felony. Such a determination must be made from the appropriate portions of the record of conviction. (See *Apprendi*, *supra*, 530 U.S. 466; *People v. Guerrero* (1988) 44 Cal.3d 343; *People v. Myers* (1993) 5 Cal.4th 1193; and *People v. Reed* (1996) 13 Cal.4th 217.)



Judge J. Richard Couzens

Judge Couzens is a former member of the Judicial Council and past chair of its Criminal Law Advisory Committee.

THREE STRIKES NETWORK



- The authenticity, accuracy, or sufficiency of the records of the prior conviction, provided the defendant has presented sufficient evidence to the court that the presumption of regularity under Evidence Code section 664 legitimately is at issue. (See *Epps*, *supra*, 25 Cal.4th 19.)
- The date of the conviction.
- In cases of juvenile adjudications, whether the defendant was 16 or older when the offense was committed.

The only comfort trial courts might take in all of this confusion is that *Epps* held that the effect of any error made by the trial court in not granting the defendant a jury trial on the prior conviction was to be evaluated under the harmless-error test of *People v. Watson* (1956) 46 Cal.2d 818, 836. ■

Q&A

Continued from page 10

tunity for each member of the task force to make a significant contribution to increasing access to our courts.

Any thoughts on the California courts' new online self-help center? What kind of impact do you expect it to have?

First, I would especially like to thank Bonnie Hough, Senior Staff Attorney in CFCC, for the leadership role she has taken in the development of the self-help site. It has the potential to have a tremendous impact on access to the court system. It will provide a valuable service to self-represented litigants. For example, I reviewed the small claims section of the site and found it to be very thorough, helpful, and instructional. Litigants who review the materials on the site should gain a good working knowledge of court rules and how best to present their case.

There is no question that technology will play a critical role in the legal system in the future. If we are to continue to thrive as an institution, we must evolve and respond to the ever-changing needs of the customers we serve. ■

Interpreters on the Line

The Administrative Office of the Courts (AOC) has begun conducting a one-year pilot project in which certain courts supply litigants with remote interpreter services via specialized telephone and audio equipment. The new services are intended to improve the access of non-English-speaking litigants at courts with limited or no certified court interpreters living within their jurisdictions. The project begins this summer in Del Norte, El Dorado, Fresno, Humboldt, Kern, Merced, Mono, Nevada, San Benito, Shasta, and Tulare Counties. Participating courts will have access to qualified interpreter services for nonevidentiary proceedings lasting 30 minutes or less. Unlike conventional conference calling and speakerphones, the specialized audio equipment will allow for simultaneous as well as consecutive interpreting.

So far, 14 certified Spanish interpreters and 2 certified Korean interpreters have been trained to use the new equipment, and there are plans to train Arabic, Armenian, Farsi, Mandarin, and Russian interpreters. After the AOC evaluates the effectiveness of the project, it plans to expand the program, with the goal of equipping at least one courtroom in each of the 58 counties.

● For further information, contact Beth Gatchalian-Litwin, Trial Court Programs Division, 415-865-7631; e-mail: beth.gatchalian-litwin@jud.ca.gov. ■



On June 4 and 5, court interpreters and staff from the Superior Court of San Diego County participated in a training session for the remote interpreting pilot project. (Seated) Staff Interpreter Charles Brown and Interpreter Blanca Armenta. (Standing, left to right) Interpreter Coordinator Diana Lopez-Lara, Interpreter Supervisor Vicki Brown, Interpreter Carmen Benbrook, Interpreter Roberto Lucero, Interpreter Tyna Maynard, Trainer James Comstock, Interpreter Yoli Brennen, Interpreter Ana Maria Iturbe, Interpreter Gina Arteaga, and Interpreter Oscar Gonzales.

Update on Privacy and Social Security Numbers



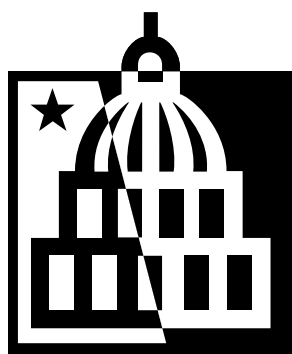
José F. Dimas

JOSÉ F. DIMAS
ASSOCIATE, OFFICE OF
GOVERNMENT RELATIONS
NATIONAL CENTER FOR
STATE COURTS

The current Congress is once again looking at ways to restrict the display of social security numbers (SSNs) to, and their acquisition by, the public. These actions could have repercussions for state courts.

E. Clay Shaw, Jr. (R-FL), chair of the House Ways and Means Subcommittee on Social Security, has reintroduced legislation (H.R. 2036) that would prohibit public acquisition and display of SSNs. This bill specifically includes the judiciary in its prohibition. In addition, Senator Dianne Feinstein (D-CA) and Senator Judd Gregg (R-NH) have reintroduced Senate Bill 848, the so-called Amy Boyer legislation, which also targets SSN display and acquisition. Both of these bills are substantially the same legislation that failed in the last Congress. (See *Watch on Washington* in the January–February 2001 *Court News*.)

The impetus for these two pieces of legislation was the public's concern for privacy. The Amy Boyer legislation was named for a murder victim whose killer



Watch on Washington

state courts use SSNs in court records and the various requirements for collection of SSN data that are imposed upon state courts. The input GAO received from COSCA will be used in the study.

COSCA TESTIMONY

On May 22, Representative Shaw held a hearing on SSN identity theft and misuses of SSNs. COSCA President David Byers, a court administrator from Arizona, submitted to the Ways and Means Subcommittee on Social Security written testimony on the state courts' position on this issue. At a minimum, Mr. Byers asked the subcommittee to await the results of the GAO study before taking any legislative action on the matter.

He also outlined the ways state courts use SSNs:

Identification of parties SSNs provide a unique identifier by which court personnel can determine whether the current "John Smith" is the same person as a "John Smith" who appeared in an earlier case.

Collection of fees, fines, and restitution by courts SSNs are the universal personal identifier for credit references, tax collection, and commercial transactions.

Creation of jury pools and payment of jurors SSNs are a necessary part of the process by which computer programs merge multiple lists (for instance, registered voters and registered drivers) to eliminate

quire that the judgment debtor make this information available without requiring separate discovery proceedings that lengthen the collection process and increase its costs.

Notification to the Social Security Administration of the names of incarcerated and absconded persons The Social Security Administration cuts off all payments to persons incarcerated in federal, state, or local prisons or jails and to persons who are currently fugitives from justice. (See 42 U.S.C. § 402(x)(3), requiring federal and state agencies to provide the names and SSNs of confined persons to the Social Security Administration.)

Transmitting information to other agencies Some states share information with their departments of motor vehicles for enforcement of driver's license revocation procedures.

CONFLICTING REQUIREMENTS IN FEDERAL LAW

Any kind of requirement limiting the publication of SSNs would expose the conflicting rules governing the use of SSNs by state courts and other government entities. For example, the Welfare Reform Law requires courts to enter SSNs on court orders granting divorces or child support and orders determining paternity. What steps must a court take to restrict access to these documents, which are matters of public record in most states?

In addition, SSNs appear in many financial documents, such as tax returns, that may be re-

numbers. Courts would have substantially increased labor costs in the staff time required to redact or strike the appearance of SSNs in paper records or in microfilm/microfiche if a redaction requirement were imposed. Why? To redact a microfilm/microfiche document, one must first make a paper copy of the film, then manually strike the relevant section, then turn the paper into film again. This three-step process would be costly.

In an effort to make courts and court records more open, numerous courts are now beginning to make many public records available on the Internet, either by storing them as text documents or by scanning them and placing them online through imaging software (usually PDF files). Whereas the removal of an SSN from a text document might be relatively easy, scanned records such as PDF files would be harder to change, necessitating more staff time and an increase in labor costs.

Charles Bacarisse, a district clerk in Harris County, Texas, stated, "We estimate the cost of redacting one document at \$8.07, and last year more than 16,600 divorces were granted in Harris County. Each year we scan about 930,000 certified pages from family law cases. That's a lot of pages to check." He estimates that he would need 25 additional staffers for at least 10 years, which would cost the county \$1 million per year. If this law were approved, it would certainly be as an unfunded mandate, passed along to state and local governments.

Prospects for passage of the legislation remain doubtful. Although victims of identity theft may attract considerable attention from the media and the public, H.R. 2036 and Sen. 848 have drawn the opposition of some well-heeled special interests such as financial institutions, retailers, data collectors, and other commercial organizations. In addition, legislation has already been introduced in both the Senate and the House for the establishment of a privacy commission to

Although SSNs are bought and sold every day on the Internet, the public is especially concerned about the misuse of information that they are legally required to provide to governmental entities.

purchased her SSN on the Internet and then used it to gain other personal information. In addition, a surge in identity theft cases has added fuel to the public's growing fear of the misuse of personal information, particularly social security numbers.

A victim's SSN, the most common piece of information used by perpetrators of identity theft, can be used to commit other criminal acts, such as credit fraud and falsification of a criminal offender's identity. Although SSNs are bought and sold every day on the Internet, the public is especially concerned about the misuse of information that they are legally required to provide to governmental entities.

GAO STUDY

Because of the lack of resolution on this issue last Congress, Representative Shaw and Senator Jon Kyl (R-AZ) called on the U.S. General Accounting Office (GAO) to undertake a study of the uses of SSNs on all levels of federal, state, and local government. The results of the study should be released by the end of 2001.

On May 11, 2001, the board of directors of the Conference of State Court Administrators (COSCA) met with GAO analysts regarding this study. During the meeting, a free-flowing discussion took place on the ways in which

Courts would have substantially increased labor costs in the staff time required to redact or strike the appearance of SSNs in paper records or in microfilm/microfiche if a redaction requirement were imposed.

duplicate records for individual citizens. This process is used in the creation of the master source lists from which citizens are selected at random for jury duty.

Facilitating the collection of judgments by creditors and government agencies Courts are not the only entities that need to collect judgments. Judgment creditors need SSNs to locate a judgment debtor's assets and levy upon them. Courts often re-

quired to be filed in court (e.g., for child support determinations) or appended to official court documents, such as motions for summary judgments. Again, the following question must be posed: What steps must a court take to restrict access to these documents, which also are matters of public record in most states?

An issue that is important to courts and has received little attention in the debate over SSNs is the cost of suppressing the

study the issue and publish a report in the near future. This could serve as a convenient "cover" for many members of Congress who would prefer to vote for a toothless bill on privacy.

José Dimas can be reached at 703-841-5610; e-mail: jdimas@ncsc.dni.us. ■

Education & Development

ADA Coordinators Meet

The second statewide conference for court-based Americans With Disabilities Act (ADA) coordinators took place from April 23 to April 25 in Costa Mesa. It was held in conjunction with the Administrative Office of the Courts' Continuing Judicial Studies Program.

The conference attendees—who included court administrators and judicial officers as well as ADA coordinators—received training on the requirements of the Americans With Disabilities Act of 1990, section 12101 of title 42 of the United States Code, and other federal and state statutes, such as the Unruh Civil Rights Act.

The conference featured panel discussions of topics including stereotypes and counterstereotypes, the roles and responsibilities of ADA coordinators, real-life experiences with accommodation situations, service providers, the news media and ADA issues, surveying the courthouse, and designing and implementing a comprehensive court ADA program.

Two course tracks were introduced at this year's conference. In the basic track, new coordinators received guidance from faculty with substantial expertise and experience in ADA issues. The participants learned to identify the three categories of accommodations—physical, programmatic, and communication—and how to provide them.

The advanced track was designed for experienced ADA coordinators, administrators, and judges and commissioners. It emphasized the implementation of and compliance with the ADA and included interactive plenary sessions and workshops as well as presentations and problem-solving exercises.

For more information, contact Clifford Alumno, 415-865-7683; e-mail: clifford.alumno@jud.ca.gov.

Juvenile and Family Court Conference

The National Council of Juvenile and Family Court Judges is

holding its 64th annual conference July 15–18 at the Doubletree Hotel in Monterey. This year's conference, titled "Juvenile and Family Courts: Challenges and Opportunities," showcases practitioners who are creating innovative programs and initiatives for existing and future juvenile and family courts.

Among the conference's distinguished speakers is Stephen Adams, Editor of the *California Family Law Report*, who will deliver his annual update on developments in juvenile and family law. King County, Washington, Superior Court Judge David Admire will discuss how courts can identify and work with learning-disabled children. In addition, Chief Justice Ronald M. George will deliver an opening keynote address on his vision of the future of California's juvenile and family courts.

The conference will include a variety of workshops on issues such as interstate child custody disputes, the Violence Against Women Act, family group conferencing, batterer intervention programs, postadoption services, underage drinking, restorative justice, and more.

For more information, contact Mary Scott, National Council of Juvenile and Family Court Judges, 775-784-6576.

Drug Court Training

The National Drug Court Institute (NDCI) is offering practitioner-based classes to courts in September and October this year.

Recognizing the continuing need for topical and up-to-date information on drug courts, the NDCI developed its curricula with assistance from leading national agencies and practitioners throughout the country. Its week-long trainings are taught by expert drug court practitioners, using videotapes and interactive techniques. Attendees are exposed to basic and advanced topics in the areas of substance abuse and treatment, drug testing, sanctions, incentives, community resources, ethics and confidentiality, and coordinating with law enforcement agencies.

For more information, contact Colby Miller, 703-706-0576, extension 28.

RESOURCES

New Listserv for Family Violence Councils

The Administrative Office of the Courts' Center for Families, Children & the Courts (CFCC) recently launched an e-mail listserv exclusively for California's Family Violence Coordinating Councils (FVCCs). The listserv gives FVCC members an additional venue for sharing ideas on strategies, funding sources, and promising practices.

Family Violence Coordinating Councils are designed to facilitate collaboration and information sharing among the courts, public agencies, and private agencies regarding domestic violence issues. The members of the councils typically include judicial officers, court executive officers and clerks, domestic violence victim advocates, prosecutors, defense attorneys, probation officers, social services staff, mediators, family law facilitators, supervised visitation agency staff, police officers, health care personnel, attorneys, and others who deal with domestic violence issues. The listserv will augment the Judicial Council's annual conference for FVCCs by providing a year-round vehicle for communication.

To subscribe to the listserv, FVCC members should send an e-mail message to tamara.abrams@jud.ca.gov or julia.weber@jud.ca.gov. The e-mail should include (1) your name; (2) your organization's name, address, and telephone number; (3) your e-mail address; and (4) a brief (one- or two-sentence) description of your participation in your county's FVCC.

For more information, contact Tamara Abrams, CFCC, 415-865-7712, or Julia Weber, CFCC, 415-865-7693.

New Format for Capitol Connection

The Judicial Council's Office of Governmental Affairs recently unveiled a new format for its monthly publication, the *Capitol Connection*. Starting with its May 2001 issue, the monthly has a new look that incorporates full color and photographs.

Each month, the *Capitol Connection* provides more than 1,000 readers with the latest news on legislation and politics in Sacramento. From legislative updates to exclusive interviews with legislators, it helps the courts stay in touch with goings-on in the capital city.

For more information or to subscribe to the *Capitol Connection*, contact Yvette Trevino, 916-323-3121; e-mail: yvette.trevino@jud.ca.gov. In addition, visitors to the California

Courts Web site can see archived copies of the *Capitol Connection* at www.courtinfo.ca.gov/courtadmin/aoc/capconn.htm.

AOC Debuts HR Newsletter

June 2001 marked the Administrative Office of the Courts' (AOC) introduction of *HR Connect*, a monthly newsletter for the California court community. In launching *HR Connect*, the AOC's Human Resources (HR) Division hopes to establish a forum for discussing up-to-date human resources issues and concerns that affect the courts.



The audience for the newsletter includes appellate court justices, trial court judges, and staff members of the Supreme Court, the Courts of Appeal, the superior courts, the AOC, the Habeas Corpus Resource Center, and the Commission on Judicial Performance. In creating the newsletter's content, the AOC's HR Division has been guided by feedback solicited during court visits, conferences, training sessions, and committee meetings.

HR Connect provides information on benefits, human resources programs in transition (such as workers' compensation), and human resources information management systems. In addition, it features a question-and-answer section that addresses queries from its readers.

The AOC's HR Division invites the readers of *HR Connect* to suggest future features and ideas about how to make the newsletter more useful, relevant, engaging, or accessible. For more information or to submit suggestions, send e-mail to Paula Bocciardi, Management and Program Analyst, at paula.bocciardi@jud.ca.gov.

Click on Court Stats

The Administrative Office of the Courts invites judges and court staffs to take an advance look at the Judicial Council's annual *Court Statistics Report*, now posted on the Judicial Branch Statistical Information System (JBSIS) Web site, which can be reached through Serranus at <http://serranus.courtinfo.ca.gov>. The report, a companion to the *2001 Judicial Council Annual Report*, will be available to the public by the end of July on the public California Courts Web site, www.courtinfo.ca.gov/reference/.

The report provides detailed statewide caseload statistics for fiscal year 1999–2000 as well as 10-year trend data on a wide range of court business. A printed version, which includes only the statewide-data section of the report, is being mailed to presiding judges, court executive officers, and selected media. The county-by-county data is available only on the Web site and can be downloaded as needed.

For more information, contact the Office of Communications, 415-865-7740; e-mail: pubinfo@jud.ca.gov.

Judicial Council of California
Office of Governmental Affairs

Volume 3, Issue 4
May 23, 2001

THE CAPITOL CONNECTION

INSIDE THIS ISSUE:

ACA 1 Working Group

1

Governor's Budget Revise

1

Grabbing the e-Gavel

2

Committee on Privacy

3

From the Headlines

4

New Legislators

5

The Ought to be a law

6

LEGISLATIVE
CALENDAR:

Summer Recess Begins

July 20

Legislature Reconvenes

August 20

Last Day of Session

September 14

Last Day for Governor to
Sign or Veto

October 14

ACA 1 WORKING GROUP FORMED

Chief Justice Ronald M. George appointed a working group to examine Assembly Member Joe Nation's (D-San Rafael) proposed constitutional amendment, which would eliminate contested elections to fill judicial office vacancies in superior courts and create retention elections for superior court judges. The constitutional amendment would provide that when there is a vacancy, either because a judge leaves office prior to the end of the term or because the judge chooses not to serve the succeeding term, the Governor will appoint someone to fill the vacancy. At the next general election, the appointee's name will appear on the ballot and the electorate will determine whether the judge should be retained.

Justice Roger W. Boren, Court of Appeal, Second Appellate District, chairs the working group. The working group's charge is to review the proposed constitutional amendment, identify the factors and concerns that gave rise to it, assess the responses to those factors and concerns provided in ACA 1, and identify and evaluate alternative means of addressing them. The Judicial Council's working group on ACA 1 will publish its report in early June. The Assembly Judiciary Committee will have a hearing on ACA 1 on July 3rd.
(See Spotlight on Page 4)

Chief honored...

Court of Appeal Justice Richard D. Huffman (left) and Supreme Court Justice Marvin R. Baxter (right) present resolutions from the Judicial Council and the state Legislature to Chief Justice Ronald M. George (center) in honor of his fifth year in office.

GOVERNOR RELEASES REVISED BUDGET

Governor Davis released his revised budget for FY 2001–02 on May 14, 2001. The "May Revise" represents adjustments to the budget submitted to the Legislature in January based on updated revenue and spending projections. As expected, the realities of an unresolved energy crisis and a sluggish state economy have resulted in significant cuts throughout the spending plan. Funding for the judicial branch, as itemized in the Governor's Budget released in January, was left largely intact.

The release of the Governor's revised budget sets the stage for further hearings and negotiations in both houses of the Legislature. Any disagreements between the two houses on the budget will be referred to a conference committee to resolve.

The lone judicial branch reduction in the revised budget was the elimination of a proposed increase of \$5 million.
(Continued on page 2)